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ALEXANDER L. STEVAS

No. 80-1717

IN THE

Supreme Court of the United States

October Term, 1980

READING INDUSTRIES, INC.,

Petitioners,

v.

KENNECOTT COPPER CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' OPPOSITION

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ARGUMENT

Respondents' opposition acknowledges that the core determination by the Courts below was factual. However, they ignore the crucial point that this determination resulted from a summary judgment motion. Petitioner, therefore, was denied the opportunity to submit its proof as to "causal relationship" which Respondents concede is the basic question presented on appeal. Rather, their opposition attempts to meet Petitioner's showing by a counterstatement of the case which carefully avoids the

relevant facts and attempts to confuse the basic issue involved.[1]

Respondents apparently seek to persuade this Court not to review the novel, drastic and far-reaching doctrine established by this decision in which antitrust standing was denied in the face of uncontroverted facts demonstrating:

- The existence of a conspiracy by the major copper companies which had the purpose and effect of suppressing supply and controlling prices in a basic segment of a single world market for copper, exercised through monopolistic control of that segment.

- Repeated refusals by Respondents to allow Petitioner the opportunity of purchasing lower-priced refined copper from them (an opportunity which Petitioner specifically sought), forcing Petitioner to purchase copper from other sources in the world market.

- Copper from sources other than Respondents were caused to increase to artificially higher price levels as a result of Respondents' market manipulation and conspiracy.

- Petitioners were additionally injured in their ability to compete with Respondents in the sale

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[1]For example, Respondents incorrectly state that Petitioner's Amended Complaint "withdrew all but one of its several pleaded claims." The Amended Complaint sought to consolidate Respondents' challenged acts and practices into two basic violations of Sections 1 and 2 of the Sherman Act. With the exception of the Robinson-Patman Act claim which was abandoned and the Section 7 claim which was stayed by the District Court, all claims previously asserted were incorporated as acts in furtherance of these two basic violations.

> of copper-fabricated products which Respondents were pricing below their marginal cost of copper — their allocated artificially low-priced copper.

Certainly, the purchaser in the market affected by such a pervasive conspiracy should have the opportunity to recover injuries sustained by it as a result of the conspiracy if, at trial, it can establish by a preponderance of the evidence that the injury was the proximate cause of the violation.

As the evidence below disclosed, this causation was readily acknowledged in the copper industry. In fact, Respondents' own economic expert, Dr. Allan Greenspan, cited the copper market as an example of artificially low prices in one segment of a single market causing prices in the remaining segments of that market to increase to artificially high levels. Dr. Greenspan wrote:

> "[W]hen demand is in excess of supply at the prevailing price level. . .some customers orders will not be filled. Under such conditions, ancillary sources of supply at premium prices will tend to develop. The current [copper] wire bar market is, of course, an extreme example of the co-existence of an artificially low price and an artificially higher premium price." *Challenge Magazine*, October 1966.

Petitioner was improperly denied an opportunity to prove this causation at trial because of the misuse of the procedures of summary judgment.

Respondents also seek to create the impression that scrap copper was a market wholly separate from refined copper in the world market. The facts are otherwise. The

price for copper scrap was directly tied to the price for refined copper on the world market – the price for scrap copper was the price of world market refined copper minus the cost of converting that scrap into refined copper.

Further, Respondents do not and cannot deny that the evidence adduced during discovery demonstrates that Petitioner did in fact seek, and was denied the opportunity, to purchase refined copper from Respondents. Respondents themselves made such evidence a part of the record.[2]

Under the principles previously established by this Court, a court on a motion for summary judgment must consider not only the pleadings, but whatever depositions, exhibits, affidavits and admissions are submitted into evidence. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). In reaching its determination as to Reading's standing, the lower Court was obligated to consider Reading's attempts and Respondents' refusals.

The failure to consider this fact, Petitioner submits, is implicit in the revision issued on May 6, 1981, by the Second Circuit.[3]

Moreover, the revision itself is an incorrectly narrow construction of the allegations of the Amended Complaint. It was claimed therein that in furtherance of Respondents' conspiracies in violations of Sections 1 and 2 of the Sherman Act, Respondents engaged in certain other acts and prac-

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[2]*See*, certified record from below, Excerpts of Depositions and Exhibits in Support of Defendants' Motions for Summary Judgment Vol. 1.

[3]*See*, Petitioner's Letter of May 7, 1981, to the Clerk of the Supreme Court.

tices, among which was the preferential allocation of their refined copper output to select customers and their own subsidiaries.

Respondents clearly understood this claim to be "replete with allegations suggestive of . . . a concerted refusal to deal [with Petitioner]. . . .". (Respondents' Letter to Judge Lasker of May 18, 1979).

As Petitioner has stated in its Petition for Writ of Certiorari and as Respondents' opposition recognizes, the Courts below were influenced by the misconception, in Petitioner's view, of the thrust of *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). While we disagree with the interpretation and use of *Illinois Brick* by the Courts below to deny standing because of asserted difficulties in "tracing" a claim, it is clear that no such principles can be used to deny Petitioner standing in this case once it is conceded Petitioner was denied the opportunity to buy refined copper from Respondents at lower prices.

Finally, while Respondents do not contest the conflict among the Circuits with regard to the standard to be applied in interpreting Section 4 of the Clayton Act, Respondents argue that Petitioner places "an undue emphasis on verbal formulations of the test". (Respondents' Brief in Opposition, at p. 7).

Petitioner respectfully suggests that the formulation of this test is of extreme practical importance and significance to the proper disposition of the various factual determinations with which the lower courts are faced in the actual administration of the antitrust laws.

Respectfully submitted,

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